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February 13, 2003

William F. Maher
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Ex Parte - *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98; and *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147.

Dear Mr. Maher:

In this letter, RCN Telecom Services, Inc. ("RCN") and ICG Communications, Inc. ("ICG") address certain proposals contained in Verizon's letter to you of December 17, 2002[1] ("Verizon Letter").

1. <u>The Collocation-Based Triggers Established for the Grant of Price Cap ILEC Pricing Flexibility Have No Place in an Impairment Analysis for Unbundling Purposes</u>

Verizon proposes that the same triggers now used for interstate access pricing flexibility be used instead of the current impairment test (weighing cost, timeliness, ubiquity, quality, and impact on network operations) in determining whether high capacity loops and transport must be made available as unbundled elements. ICG and RCN remind the Commission that it has already rejected using those triggers, which are largely based on the mere existence of collocation nodes, for the very different purpose of determining whether alternative sources of network elements are actually available:

> 131. We note that we established recently collocation-based triggers to determine when it would be appropriate to grant incumbent LECs pricing flexibility for

[1] Letter to William F. Maher, Chief, Wireline Competition Bureau, Federal Communications Commission, from Michael E. Glover and Susanne Guyer, Verizon (Dec. 17, 2002) ("Verizon Letter").

certain interstate access services based on the existence of competition for those services. In the *Pricing Flexibility Order*, we stated that the triggers we adopted were policy determinations based on our agency expertise and our interpretation of the record before us in that proceeding. We acknowledged, however, that the use of triggers to measure competition precisely is not an exact science, particularly because we lack verifiable data from competitors concerning the deployment of their facilities. Given this constraint, and our desire not to impose heavy administrative burdens on the industry or conduct protracted proceedings to determine the extent of competition, we devised pricing flexibility triggers based on "objectively measurable criteria," such as the number of collocation arrangements in a given wire center. We found that it is appropriate to give incumbent LECs pricing flexibility when competitors have made an irreversible, sunk investment in facilities, and that collocation by competitors in incumbent LEC wire centers is a reliable indication of sunk investment by competitors. Specifically, to obtain pricing flexibility, we required incumbent LECs to show that "*at least one* competitor relies on transport facilities provided by a transport provider other than the incumbent at each wire center listed in the incumbent's pricing flexibility petition as the site of an operational collocation arrangement."

132. It is not appropriate to use these types of triggers to determine whether alternative sources of network elements are actually available as a practical, economic, and operational matter. As we explain above, the ability of one competitor to serve certain customers in a particular market is not indicative of whether, without unbundled access to the incumbent LEC's facilities, competitive LECs could provide service to other customers in the same market or to customers in other markets. While the triggers we adopted in the *Pricing Flexibility Order* allow us to determine when an incumbent LEC can re-price its services to respond to competition, they do not allow us to evaluate whether the incumbent LEC can withhold access to the inputs that requesting carriers need to provide competitive services in the first place. In order to undertake this evaluation, we must consider the cost, timeliness, quality, ubiquity and operational characteristics of alternative elements. As we explain above, discerning the practical, economic, and operational viability of these alternatives is technical, complex, and subject to considerable uncertainty. Based on the record before us, we do not believe that we can develop reliable triggers based on objectively measurable criteria to make this determination. In particular, the administrative difficulty associated with developing triggers that capture the cost, timeliness, quality, ubiquity, and operational factors of alternatives in every wire center throughout an incumbent LEC's service territory requires us to reject such an approach. Indeed, the Commission chose precisely to adopt triggers in the *Pricing Flexibility Order*, because we found that they were administratively easy to apply. Conversely, it would not be administratively easy to apply triggers to determine which network elements the incumbent LECs must unbundle. Moreover, the use of triggers also does not allow us to evaluate whether the

> unbundling obligations we adopt are consistent with the goals of the Act, as the Supreme Court has required us to do.[2]

The Commission's reasoning from the 1999 *UNE Remand Order* is even more compelling now, as discussed below.

In its 1999 *Pricing Flexibility Order*, the Commission established rules for granting price cap local exchange carriers, such as Verizon, flexibility in the pricing of their interstate access services once they satisfy certain "triggers" to "demonstrate that market conditions in a particular area warrant the relief at issue."[3] The Commission reasoned that pricing flexibility could be granted in situations where the price cap LEC was able to show that "markets are sufficiently competitive both to warrant pricing flexibility to enable incumbent LECs to respond to competition and to discourage incumbents from either excluding new entrants or raising rates to unreasonable levels."[4]

The Commission decided in its *Pricing Flexibility Order* that the existence of collocation arrangements of competitive providers[5] could form the basis of an appropriate trigger to determine whether pricing flexibility was justified[6] for special access and dedicated transport services. Phase I pricing flexibility was to be granted for special access and dedicated transport services when the ILEC demonstrated either that (1) competitors had established operational collocation arrangements in a certain percentage of the incumbent LEC's wire centers in an MSA, or when (2) competitors had established operational collocation arrangements in wire centers accounting for a certain percentage of the incumbent LEC's revenues from the services in question in that MSA.[7] Essentially, at the time the Commission established its pricing flexibility rules in 1999, it believed that collocation arrangements were an "important indicator" of

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[2] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶¶ 131-132 (footnotes omitted) (1999) (*"UNE Remand Order").*

[3] *See Access Charge Reform*, CC Docket No. 96-296, Fifth Report and Order and Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶ 68 (1999) (*"Pricing Flexibility Order"*).

[4] *See id.*

[5] "We conclude that incumbent price cap LECs are entitled to Phase I pricing flexibility for dedicated transport services (entrance facilities, direct-trunked transport, and the flat-rated portion of tandem-switched transport) and special access services other than channel terminations upon demonstrating that competitors have collocated in 15 percent of an incumbent LEC's wire centers in the MSA, or in wire centers accounting for 30 percent of the incumbent LEC's revenues from these services." *Id.*, ¶ 93 (footnote omitted).

[6] *See id.*, ¶¶ 79-80.

[7] In either case, the ILEC also had to show, with respect to each wire center relied upon, that at least one collocator was relying on transport facilities provided by a transport provider other than the incumbent LEC. *Id.*, ¶ 77.

irreversible entry by competitive providers of access services.[8] The Commission assumed that that even if an incumbent were successful in driving out a collocated competitor, the facilities of that competitor could be bought by another competitive provider to compete with the incumbent's services.[9]

Market conditions for competitive carriers in the telecommunications industry have changed greatly since 1999, eliminating any possible usefulness of those triggers for pricing flexibility. As the Commission knows, since 1999, numerous competitive carriers have either exited the market entirely or contracted their operations by leaving many former market locations.[10] As a result, a large number of collocation facilities of competitive providers were decommissioned or sat idle in central offices. A number of carriers apparently maintained non-operational collocation space, at least on a short term basis, in order to avoid up-front decommissioning charges, which in Verizon territory have reached approximately $20,000 per collocation space.

Instances of unused collocation space became all the more likely because of rules later adopted by the Commission governing reciprocal compensation and CLEC interstate access charges. Under these post-*Pricing Flexibility Order* rules, intercarrier compensation for Internet Service Provider ("ISP")-bound traffic was prohibited in markets not being currently served by the competitive local exchange carrier ("CLEC"). Similarly, CLECs entering markets after June 20, 2001 had to tariff rates for access services at the competing ILEC rate in those markets.[11] Many CLECs had invested in markets and built-out collocation facilities based on business plans that incorporated the earlier, more favorable regulatory environment.[12] The dramatic change in the rules governing CLEC access charges and ISP-bound traffic slowed, almost halted CLEC investment in new markets, and made it more difficult for CLECs to economically use collocation facilities installed but not yet operational.

Because of all of the above, the premise that formed the basis for allowing pricing flexibility under the Commission's rules – namely, that collocation arrangements demonstrate irreversible entry by competitors – has proven to be an inaccurate indicator of competitive

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[8] *See id.* at ¶ 80.

[9] *See id.*

[10] *See* J. Molloy and E. McKeever, "The Good, The Bad, and The Ugly - Stratification Continues As the Shakeout in the CLEC Corral Rolls On," The Mirus Online Newsletter (RCW Mirus), December 2001, at http://www.imakenews.com/rcwmirus/e_article000017427.cfm.

[11] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 9-68, Order on Remand Report and Order, FCC 01-131 (rel. Apr. 27, 2001); *Access Charge Reform: Reform of Access Charges by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, FCC 01-146 (rel. Apr. 27, 2001).

[12] *See Access Charge Reform: Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Petition for Reconsideration of Focal Communications Corporation, US LEC Corporation (filed June 20, 2001).

market forces. Contrary to assertions of the Commission's *Pricing Flexibility Order*, the existence of operational[13] competitive collocation arrangements at one point in time does not demonstrate that multiple rivals have entered the market, that any sunk investment will be irreversible, or that competitive carriers cannot be driven out so as to prevent exclusionary pricing behavior on behalf of the incumbent.[14]

The collocation "triggers" established by the Commission in 1999 are no longer a meaningful assessment of the competitive conditions in the particular MSA. Given current market conditions, it is entirely possible that collocation space abandoned by a CLEC (due to bankruptcy, the post-*Pricing Flexibility* Order reciprocal compensation and CLEC access charge rules, or other reasons) was not and will not be purchased by other competitors, and therefore does not represent evidence of irreversible competition. Moreover, certain ILEC practices, such as imposition of unreasonable charges for DC power, or the ILEC's refusal to permit a CLEC to take over collocation facilities from another CLEC unless it first agrees to pay all amounts owed by the prior holder of the collocation space, also can make it difficult for CLECs to use their own collocation space or to sell/lease/transfer the collocation arrangement to another carrier.

For the reasons noted above, the collocation triggers established by the Commission in 1999 should no longer be used even to determine whether pricing flexibility is warranted; by orders of magnitude, the fact that an ILEC received Phase I pricing flexibility based on a collocation trigger in a particular MSA at some point in time under one of the varying market

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[13] The assertion by an ILEC that a competing carrier's collocation facility is "operational" (*i.e.*, serving at least one customer) in a pricing flexibility proceeding can be a matter of dispute. To support its claim that it had satisfied pricing flexibility triggers, Verizon, in its *Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD File No. 01-27 (filed Nov. 29, 2001), asserted that collocators were still operational by confirming whether they "have not terminated their collocation arrangements with Verizon." Verizon also determined the operational status of the collocators based on whether monthly charges for cable space and support structures were being billed to the collocators, and, in those instances where collocators were not being billed for these charges, Verizon indicated that it made a physical inspection of the facilities to confirm that powered equipment was in place and that a fiber optic cable was terminated at the collocation node.

Commenters argued in the proceeding that it was erroneous for Verizon to assume that a collocation facility was operational based upon the fact that the collocation arrangement for the facility had not been terminated or that billing records indicated Verizon was issuing bills charging collocators for cable space and support structures. Commenters cited an FCC proceeding to investigate Verizon's rates for DC power (*Bell Atlantic Telephone Companies Revisions in Tariff FCC Nos. 1 and 11, Verizon Telephone Companies Tariff FCC Nos. 1 and 11*, CC Docket No. 01-140, Verizon's Direct Case, Exhibit K at p. 1 (filed Jul. 17, 2001)), wherein Verizon had admitted that it charged collocators rates for DC power even when those facilities may not be operational. It was pointed out that the physical inspections described in Verizon's Petition only demonstrated that the competitive collocation facilities in which physical inspections had been performed had been constructed, but did not prove that such facilities were operational.

[14] *See Pricing Flexibility Order* at ¶ 80.

conditions that have existed since 1999 cannot be used to show that alternate central-office-to-central-office dedicated transport facilities are actually available today.

Further, even assuming *arguendo* that the criteria in 1999 were still valid in the access service market, there is an insurmountable logical problem in applying them as an impairment test for UNEs—if competitive carriers established collocations for the purpose of accessing unbundled network elements, as is often the case, then it is irrational to count these collocations as evidence that access to network elements is no longer necessary. If anything, the existence of such collocation nodes tends to *demonstrate* impairment, not the absence thereof.

a. Verizon's Proposal to Eliminate Unbundled Access to High Capacity Transport and Loops MSA-Wide Where Pricing Flexibility Has Been Granted Ignores Reality and the Law

As discussed above, any collocation-based test for determining impairment (which per Verizon's proposal would be met if pricing flexibility has previously been granted, whether or not the collocations relied upon for the grant still exist) would be an abdication of the Commission's responsibilities in and of itself. Compounding the mammoth unsuitability of the use of a collocation-based test for determining impairment is that, under either test for pricing flexibility for dedicated transport, when the ILEC obtains pricing flexibility, it is for the entire MSA, including any and all wire centers where there is not single collocator (much less any indicia of alternate sources of transport). As NewSouth Communications notes, ILECs more often rely on the revenue-based portion of the pricing flexibility test, and as a result, ILECs may obtain pricing flexibility for MSAs in which the vast majority of wire centers have no competitive collocators at all.[15]

Our discussion regarding high capacity dedicated transport applies "in spades" when it comes to high capacity loops. The *Pricing Flexibility Order* also uses a collocation-based test for the grant of Phase I pricing flexibility for high capacity loops.[16] However, the Commission acknowledged that the existence of a collocator does not mean that even one competitor has invested in even one high capacity loop (much less that any are available to other competing

[15] Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Jake E. Jennings, New South Communications, re: Ex Parte Presentation, CC Docket No. 01-338, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*; and CC Docket No. 96-98, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* (Dec. 12, 2002).

[16] "With respect to channel terminations [high capacity loops] between a LEC end office and a customer premises, incumbent LECs qualify for Phase I pricing flexibility by showing that competitors have collocated in 50 percent of incumbent LEC wire centers in the MSA, or in wire centers accounting for 65 percent of incumbent LEC revenues from these services." *Pricing Flexibility Order*, ¶ 100 (footnote omitted).

carriers). The Commission said:

> ... [A]s a number of parties indicate, a competitor collocating in a LEC end office continues to rely on the LEC's facilities for the channel termination [high capacity loop] between the end office and the customer premises, at least initially . . ., and so collocation by competitors does not provide direct evidence of sunk investment by competitors in channel terminations between the end office and the customer premises. We recognize, therefore, the shortcomings of collocation as a measure of competition for channel terminations between end offices and customer premises, but it appears to be the best option available to us at this time....[17]

b. <u>Verizon's Proposal for the Additional and Mechanical Elimination of Unbundled Access to High Capacity Transport and Loops Wire-Center-by-Wire-Center Where Pricing Flexibility Has Not Been Granted Also Ignores Reality and the Law.</u>

Verizon also asks the Commission to adopt triggers for the removal of high capacity facilities, both dedicated interoffice transport and loops, from the UNE list in areas where pricing flexibility has *not* been granted.[18] Verizon proposes that in such areas, the trigger for removal of high-capacity loops and transport as UNEs should, for any wire center, be when that wire center has two or more fiber-based collocated competitors – regardless of the prevalence of collocation in the remainder of the MSA.

This proposal is simply another version of the collocation-based trigger Verizon proposes where pricing flexibility has been granted. A collocation-based standard is just as inappropriate for use in determining impairment in areas where pricing flexibility has not been granted. The fact that two fiber-based competitors are collocated in a wire center does not mean that the fiber of either goes to any or all the same places as does the interoffice dedicated transport between ILEC wire centers that is the UNE, which is the element essential for providing most competitive services (especially since the standard Verizon proposes would apply even if there were no collocators in *any* other wire center in the MSA ("regardless of the prevalence of collocation in the remainder of the MSA")). Additionally, the fact that two fiber-based collocated competitors are located in a wire center today does not mean that either collocated competitor will still be operating in that particular wire center tomorrow, nor is it a foregone conclusion that if one or both collocators quit that wire center, that another CLEC will be willing, able, and permitted by the ILEC to take over the services provided by the former collocators.

With regard to channel terminations – high capacity loops – Verizon's proposal that the trigger for removal of high-capacity loops as UNEs should be, for any wire center, when that wire center has two or more fiber-based collocated competitors, regardless of the prevalence of collocation in the remainder of the MSA, is even worse (if that is possible). The fact that two

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[17] *Pricing Flexibilty Order*, ¶ 103 (footnotes omitted).

[18] Verizon Letter at 7-8.

fiber-based collocated competitors are located in a wire center does not mean that they have any high capacity loops at all.

The Commission considered a similar ILEC-proposed "bright line" test for transport in its *UNE Remand Order*; at that time, the proposal differed in that instead of two fiber-based collocated competitors, the proposal was for one. The Commission said:

> 344. We reject any bright-line test that triggers elimination of an incumbent LEC's unbundling obligation based on the presence of a single competitor that has self-provisioned transport in a particular market. As discussed above, in order to determine whether or not a requesting carrier's ability to provide the services it seeks to offer is "impaired" within the meaning of section 251(d)(2), we must determine whether alternatives outside the incumbent's network are available as a practical, economic, and operational matter, and determine whether unbundling a particular element is consistent with the goals of the Act.
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> 345. In particular, we find that basing our unbundling rules on the bright-line proposed by the incumbents does not address whether lack of unbundled access to the incumbent's ubiquitous transport facilities would impair other requesting carriers' ability to provide the services they seek to offer. Indeed, under the test proposed by the incumbents, the first new entrant to deploy transport facilities in any particular market would determine the degree and pace of competition in that market as well as the scope of an incumbent LEC's unbundling obligation, and would potentially result in the presence of only two competitors in the market (*e.g.* a duopoly). Limiting the development of competition in such a manner is contrary to the goals of the Act and is inconsistent with the purpose of our unbundling rules.
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> 346. In order to provide service, competitive LECs require dedicated transport facilities that are more extensive than those that are currently deployed along the point-to-point routes. The competitive alternatives that are available along limited point-to-point routes do not necessarily allow competitive LECs to connect their collocation arrangements or switching nodes according to the needs of their individual network designs. These carriers also require dedicated transport to deliver traffic from their own traffic aggregation points to the incumbent LEC's network for purposes of interconnection. Without access to the incumbent's ubiquitous transport facilities, competitive LECs are faced with the delays and costs of deploying their own transport facilities to meet the demand. Alternatively, competitive LECs must utilize a patchwork of competitive alternatives, where available, to collect and route traffic to the required destination.

UNE Remand Order, ¶¶ 344-46.

2. The Commission Should Not In Any Way Preempt the Right of a State to Unbundle Elements Not on the Federal List

Verizon not only asks the Commission to adopt the completely inappropriate triggers discussed above for the elimination of the requirement to unbundle high capacity loops and transport, it also asks the Commission to "establish binding restrictions on incumbents' unbundling obligations based on objective market conditions"[19] (*i.e.*, to prohibit a state from ordering that all high capacity loops and transport be unbundled regardless of 47 U.S.C. § 251(d)(3) and the market realities of the state). The Commission should not ever run roughshod over state commissions with regard to unbundled elements, and especially should not begin such a practice with the imposition of any "national rule" as ill-conceived as those proposed in the Verizon Letter.

3. The Commission Should Not Impose a Sunset Date for the Provision of High Capacity Dedicated Transport and Loops

Verizon also proposes that the Commission require that if high-capacity facilities are made available, any such unbundling obligation should have a firm sunset date.[20] This too, the Commission has considered, and judiciously rejected, before. We cannot articulate the wisdom of refusing to impose sunset dates for unbundled elements any better than the Commission has already done:

> 152. We decline to adopt a rule mandating that elements will not be subject to unbundling after a date certain in the future. Several parties have suggested that it would be extremely difficult for us to predict a date at which a particular network element would no longer meet the "necessary" and "impair" standards of section 251(d)(2). As noted by the Illinois Commission, in the three years since the Act was implemented, no BOC has demonstrated that it satisfies the competitive checklist in section 271. In 1996, few would have expected that three years later BOCs would not have qualified for section 271 approval. This suggests that it would be similarly very difficult for us to predict, at this time, the date at which incumbent network elements would no longer be subject to unbundling obligations under section 251. Moreover, we note that we find no basis in the record before us to make predictive judgments about when an unbundling standard will no longer be met for particular network elements. Thus, at this point in time, we do not have enough information and experience to determine what events would lead to an automatic sunset of one of our unbundling requirements. Accordingly, at this time, we decline to adopt a sunset provision for removing network elements from the national list adopted in this Order.[21]

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[19] Verizon Letter at 6.

[20] Verizon Letter at 8.

[21] *UNE Remand Order*, ¶ 152 (footnotes omitted).

4. <u>The Burden of Proof Going Forward, and the Need for the Commission to Clarify That It Will Not Condone an ILEC's Refusal to Comply with the Then-Current Unbundling Rules</u>

Verizon suggests that the burden of proof is on CLECs to establish that the impairment standard has been satisfied for each particular element in each relevant segment of the market, which it is not and should not be. Based on the record in this case, the Commission should retain high capacity dedicated transport and high capacity loops on the national list of UNEs. However, should the Commission believe a more granular approach is required, its order should at a minimum, based on the record in this proceeding, find a presumption of impairment for both high capacity dedicated transport and loops, but permit the states to allow the ILECs, upon whom the burden of proof to overcome the presumption would lie, to petition for elimination from unbundling requirements on a route-by-route basis. RCN and ICG support the detailed proposals of CompTel and ALTS in this regard.

Verizon's statement regarding the burden of proof foreshadows the continuance of a fundamental problem, however. Incumbents often take the position that they can, without prior permission from any regulatory authority, refuse to comply with existing, effective FCC and/or State commission local competition rules, including provision of unbundled elements individually or in combinations, as well as those regarding adoptions of interconnection agreements, as long as they file some sort of dispute, however fanciful. One of the most critically important things that the Commission should say in this proceeding is to clarify that incumbents may not refuse to provision requested network elements, individually or in combinations, until there is a final decision of this Commission or of a State commission, where applicable, determining that the element need not be unbundled.

Sincerely,

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